



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Fine Manufacturing, Inc.--Entitlement to Costs

File: B-261209.2

Date: May 16, 1996

Alan M. Lestz, Esq., Witte, Lestz & Hogan, P.C., for the protester.

Jeffrey I. Kessler, Esq., and William G. Bradley, Esq., Department of the Army, for the agency.

Katherine I. Riback, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not entitled to the costs of filing and pursuing its protest where agency's action to rescind prior cancellation of solicitation and award contract to protester was based on protester's agreement to perform the contract in an alternative manner permitted by the solicitation and record does not indicate that the protest was meritorious.

DECISION

Fine Manufacturing, Inc. requests that our Office declare that firm entitled to recover the costs of filing and pursuing its protest which challenged the Department of the Army's cancellation of invitation for bids (IFB) No. DAAA09-94-B-0206. Following Fine's protest and the filing of various submissions by both parties, Fine and the agency reached an agreement which rendered the protest academic. Fine asserts it is entitled to protest costs; the agency disagrees.

We deny the request.

On June 13, 1994, the Army issued the IFB at issue, seeking bids for a quantity of cartridge magazines for 9mm pistols. The IFB identified various parts of the magazine, including the follower, which were required to be built to government-supplied design specifications. As amended, the IFB provided that the follower could be manufactured out of either plastic or aluminum, but specified a complex formula applicable to the manufacture of a plastic follower.¹

¹Specifically, the required plastic was identified by the alphanumeric sequence PA110G30A43600CA249GA136MA110AB001. The various characters had technical
(continued...)

Bids were submitted by six offerors, including Fine. Fine's bid was determined to be low, and the Small Business Administration subsequently issued Fine a certificate of competency. Nonetheless, on March 3, 1995, the agency canceled the solicitation stating: "Due to an incorrect material designation for the plastic which is used on the follower, subject solicitation will be canceled." The agency further explained that it intended to include the alphanumeric sequence "A43500" in the specified formula rather than the sequence "A43600" which was actually included.²

Following cancellation, Fine filed an agency-level protest arguing that a plastic follower manufactured to the published specifications would adequately meet the government's needs. The agency denied that protest on April 11. On April 25, Fine filed a protest with our Office, challenging the agency's cancellation of the solicitation on essentially the same bases previously advanced to the agency.

The agency responded to Fine's protest by filing an agency report in which it defended its decision to cancel the solicitation. Among other things, the agency noted that the defective specification may have limited the number of bids submitted, and further stated that Fine's manufacture of the plastic follower to the "A43600" specification would create an unacceptable safety risk since that product had not been subjected to various testing requirements.

Fine responded to the agency report, submitting statements from various individuals with technical expertise and essentially arguing that the qualities of plastic manufactured to the "A43600" specification would meet the agency's requirements. Nonetheless, one of Fine's experts acknowledged "one possible area of concern," noting that Fine's manufacture of the plastic follower to the "A43600" specification would result in a follower with "greater stiffness" which would "bend less" than a plastic follower manufactured to the "A43500" specification.

¹(...continued)

significance regarding the "recipe" to be used. As discussed below, the eighth through thirteenth characters, "A43600," were most relevant to the protest.

²Both Fine and the agency agree that the characters "A43600" in the specified formula required a higher "notched izod impact" strength than would have been required by the characters "A43500."

Subsequently, Fine and the agency reached an agreement that Fine would provide an aluminum follower to the agency.³ Based on that agreement, the agency rescinded its prior cancellation of the solicitation and awarded a contract to Fine. Accordingly, Fine's arguments regarding the acceptability of the plastic follower manufactured to the "A43600" specification were rendered academic and our Office dismissed the protest. Fine subsequently submitted this request to recover its protest costs.

Under our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1995), a protester may be entitled to reimbursement of its reasonable costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to a protest. This provision is intended to allow the award of protest costs where we find that the agency unduly delayed taking corrective action in response to a clearly meritorious protest. See Tri-Ex Tower Corp., B-245877, Jan. 22, 1992, 92-1 CPD ¶ 100.

Here, the record is clear that the agency's action was not taken as a result of a clearly meritorious protest. On the contrary, the agency continues to maintain that the specification for a plastic follower published in the IFB was defective and that it would be inappropriate for the agency to field 9mm pistols which incorporate followers manufactured to that specification. The agency maintains that, rather than conceding that Fine's protest was meritorious, the agency's action was based on Fine's agreement to perform the contract pursuant to the portion of the solicitation that was not defective, that is, the portion permitting manufacture from aluminum.

On the record presented, there is no basis to conclude that Fine's protest was clearly meritorious. Accordingly, Fine is not entitled to protest costs. See PAI Corp. et al., B-244287.5 et al., Nov. 29, 1991, 91-2 CPD ¶ 508.

The request for costs is denied.

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³As noted above, the IFB specifically permitted the follower to be manufactured from either aluminum or plastic with the caveat that, if manufactured from plastic, the follower must conform to the specified formula.